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Supreme Court, U.S.
FILED
FEB 11 2003
OFFICE OF THE CLERK

No. 02-813

In The

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

vs.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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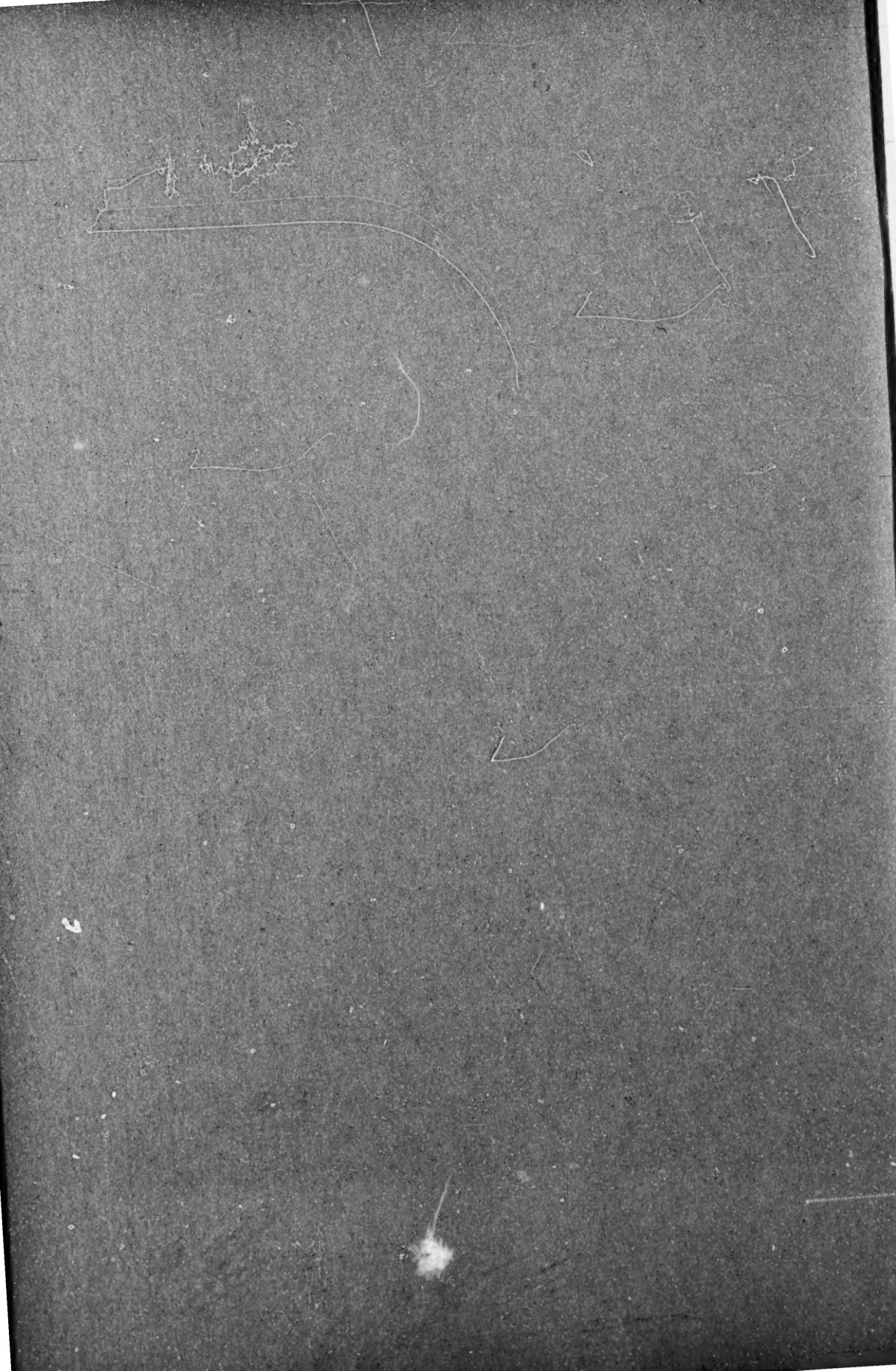

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As permitted by S. Ct. R. 15.8, petitioner Green Fire & Marine Insurance Co., Ltd. respectfully files this supplemental brief in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The intervening matter not available at the time of petitioner's last filing is a petition for a writ of certiorari that was filed by Norfolk Southern Railway Company on January 6, 2003, and distributed for the Conference of February 21, 2003. *See Norfolk Southern R. Co. v. James N. Kirby Pty Ltd* No. 02-1028 (S. Ct. Jan. 6, 2003). In that petition, Norfolk Southern asks this Court to resolve the same circuit conflict petitioner described in its petition.

TWO PETITIONS ARGUING OPPOSITE SIDES OF THE CIRCUIT CONFLICT ARE NOW BEFORE THE COURT

Petitioner's petition advised this Court of a conflict in the circuits over the question whether a non-vessel-operating common carrier ("NVOCC"[1]) is a carrier in relation to the shipper with whom it contracts to provide ocean transportation or an agent of the shipper who binds the shipper to the contract it makes with a vessel-operating common carrier. *See* Pet. 22-28. Petitioner based

[1] The NVOCC is a creature of statute – the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719. Its role and status are defined in section 3(17)(B), 46 U.S.C. app. § 1702(17)(B).

its assertion of a circuit conflict on the Eleventh Circuit's decision in *James N. Kirby Pty, Ltd. v. Norfolk Southern R. Co.*, 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (Jan. 6, 2003). In that case, the court of appeals held that a freight forwarder was not an agent of the shipper because it had assumed carrier liability by issuing a bill of lading for the carriage of goods on a vessel it did not operate. *See* Pet. 26-27.

Since the petition was filed, Norfolk Southern has petitioned this Court to review the Eleventh Circuit decision on which petitioner relies. These two petitions present the same question for review based on the same conflict in the circuits, but the two petitioners urge conflicting resolutions of this conflict.

The first question presented for review by Norfolk Southern's petition is essentially the same as the question petitioner presents. Petitioner framed the question as:

> Did the court of appeals err in holding that NVOCCs are not shippers but, as a "commercial norm," are agents of the shipper when they contract for regulated transportation with ocean common carriers?

Pet. i. In formulating its question, Norfolk Southern used the term "freight forwarder" rather than "NVOCC":

> Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

Norfolk Southern, No. 02-1028, Pet. i.

In its "Statement of the Case," Norfolk Southern is more specific:

> [T]he Eleventh Circuit, in conflict with precedents of multiple courts of appeals and of this Court, has ruled that a freight forwarder that contracts with a cargo owner as a carrier is not the agent of the owner in contracting with vessel carriers to provide the actual transportation of the goods. Thus, under the decision below, the cargo owner is not bound by the terms of the bill of lading that the vessel carrier issues to the freight forwarder.

Id. at 2.

Although International Cargo Control Pty. Ltd. ("ICC") was nominally a freight forwarder,[2] the Eleventh Circuit correctly determined it was a carrier because it had assumed carrier liability under its own bill of lading. *See James N. Kirby*, 300 F.3d at 1305-07. As ICC did not operate the carrying vessel, it was a *non-vessel-operating* common carrier, a point Norfolk Southern urges in its petition: "ICC, like any freight forwarder issuing an FBL [a particular bill of lading form] and assuming liability as a carrier, is an NVOCC." *Norfolk Southern*, No. 02-1028, Pet. 15 n.4.

Norfolk Southern's petition argues that a freight forwarder acting as an NVOCC is an agent of the shipper and binds the shipper to its contracts with ocean common

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[2] A freight forwarder is not a common carrier under the Shipping Act definition of the term. *See* Shipping Act § 3(17)(A), 46 U.S.C. app. § 1702(17)(A).

carriers. To support its view, Norfolk Southern relies on the Ninth Circuit's decision in petitioner's case, which it summarizes as follows:

> In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), the Ninth Circuit held that the cargo owner was bound by the forum selection clause included in a bill of lading issued by the vessel carrier to a freight forwarder that (like ICC here) is a "non-vessel operating common carrier" ("NVOCC"), even though the cargo owner was not a party to that bill of lading, and even though the freight forwarder had issued separate bills of lading to the cargo owner. The Ninth Circuit held that the freight forwarder was "acting as [the cargo owner's] agent when it accepted the [vessel carrier's] bill of lading." *Id.* at 1175. The Ninth Circuit observed that it is the "commercial norm" for parties to maritime shipping arrangements to treat the middleman "as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 ("[b]oth commentators and courts have recognized" this principle); *accord Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 614-15 (9th Cir. 1989). Thus, the cargo owner would be bound by the terms of the bill of lading issued by the carrier to the freight forwarder. See *Kukje*, 294 F.3d at 1177.

Norfolk Southern, No. 02-1028, Pet. 14-15.

Although Norfolk Southern agrees that the freight forwarder in its case was acting in the capacity of an NVOCC, its petition does not challenge the correctness of the Eleventh Circuit's decision in the light of the Shipping Act. Norfolk Southern's only reference to the act is its

citation of the NVOCC definition at section 3(17)(B), 46 U.S.C. app. § 1702(17)(B). *See Norfolk Southern*, No. 02-1028, Pet. 14-15 n.4.

Norfolk has little to gain by focusing this Court's attention on the statutory role and status of NVOCCs because the Eleventh Circuit concluded, in a manner consistent with the Shipping Act, that the freight forwarder-*cum*-NVOCC in *James N. Kirby* was *not* the agent of the shipper. The court of appeals held that ICC was a carrier, such that the shipper was not bound by ICC's contract with Hamburg Süd, whose vessel carried the goods. Rather, Norfolk Southern asks this Court to reverse the Eleventh Circuit on the basis of the Ninth Circuit's decision in this case – a decision that refers to the statutory definition of NVOCC and then proceeds to contradict it.

THE CIRCUIT CONFLICT REFLECTS THE CONFLICTING INTERESTS OF SHIPPERS AND CARRIERS

Viewed together, the petition herein and Norfolk Southern's petition in No. 02-1028 reveal that the Ninth and Eleventh Circuits have reached diametrically opposite conclusions about whether a non-vessel-operating common carrier is the agent of its shipper and thereby binds the shipper to the ocean common carrier. The importance of resolving this circuit conflict is illustrated by the fact that two petitions – seeking conflicting results – have been scheduled for Conference on the same day. As both petitions argue, the question whether the relationship between shipper and NVOCC is an agency relationship or a shipper-carrier relationship has important consequences

for the shipping industry. As petitioner herein argues, the Ninth Circuit's disposition of the question will complicate and may impede the Federal Maritime Commission's efforts to regulate transactions between shippers and NVOCCs, a part of its mandate under the Shipping Act. *See* Pet. 21-22.

The petition herein explains the position of shippers who believe they should not be held bound to ocean carriers with whom they did not contract and to carrier bills of lading they never saw and to which they did not assent. Norfolk Southern's petition presents the position of carriers who believe they should be allowed to enforce their contracts with NVOCCs against shippers with whom they did not contract. Petitioner submits that the conflicting positions of carriers and shippers – mirrored in the conflicting decisions of the Ninth and Eleventh Circuits – should be resolved by a proper construction of the Shipping Act's definition of the role and status of NVOCCs.

THE SHIPPING ACT GOVERNS THE QUESTION INVOLVED IN THIS CIRCUIT CONFLICT

As noted, Norfolk Southern would prefer to have this Court resolve the circuit conflict without resorting to the Shipping Act. The railroad takes the position that this Court should adopt the Ninth Circuit's conclusion that NVOCCs are shippers' agents, even though that decision contravenes the Shipping Act's definition of the NVOCC.

Petitioner's petition recited the lengthy history behind the regulation of NVOCCs, noting that the Federal Maritime Commission, at its creation, took up the project begun by its predecessor agency to require NVOCCs – like

vessel-operating common carriers – to establish and abide by their own carrier tariffs. *See* Pet. 13-16. For four decades the Commission has considered it necessary to regulate NVOCCs in order to achieve the purposes of the Shipping Act. Congress evidently agreed because it established a definition of NVOCCs and authorized the Commission to regulate them as part of the Shipping Act of 1984.

Norfolk Southern's petition is silent on the effect of the Shipping Act; the railroad apparently would rather have the Court resolve this circuit conflict without considering the statute that creates and defines the NVOCC. Presumably, Norfolk Southern would like this Court to resolve this conflict without seeking the Federal Maritime Commission's views on the question. Petitioner respectfully asks the Court to consider its petition in the proper statutory context: Which of the conflicting circuit opinions squares with the Shipping Act?

CONCLUSION

As Norfolk Southern chose not to present the issue in its proper statutory context, petitioner respectfully asks the Court to grant its petition herein and to hold Norfolk Southern's petition pending review of this matter.

Respectfully submitted,

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February 10, 2003